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IN THE

Supreme Court of the United States

TERM, 1970.

No. 381

ELI S. JENKINS III,
Petitioner,

vs.

THE FLORIDA BAR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petition of Eli S. Jenkins III for Writ of Certiorari respectfully shows:

DECISION TO BE REVIEWED

This proceeding originates from a final judgment of the Supreme Court of the State of Florida entered April 7, 1970, in Case No. 39,489, ___ So.2d ___ (Fla. 1970), not yet officially reported. Petition for Rehearing was denied on May 1, 1970. Said judgment suspended

Petitioner from the practice of law for an indefinite period. Copies of the judgment and denial of the Petition For Rehearing Or, In The Alternative, For Stay Order are appended hereto as are copies of the Petition For Suspension of the Florida Bar; Petitioner's Response thereto; Petitioner's Petition For Rehearing Or, In The Alternative, For Stay Order and The Florida Bar's Reply thereto and are designated as follows:

1. A-1 Petition For Suspension of The Florida Bar
2. A-5 Petitioner's Response
3. A-19 Court's Order of April 7, 1970
4. A-20 Petitioner's Petition For Rehearing
5. A-28 The Florida Bar's Reply
6. A-29 Court's Denial of Rehearing

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are as follows:

1. Final judgment of the Supreme Court of Florida indefinitely suspending the Petitioner from the practice of law dated April 7, 1970.

2. Timely Petition For Rehearing Or, In The Alternative, For Stay Order denied by the Supreme Court of Florida on May 1, 1970.

3. Title 28, §1257 U.S.C.A.

4. Rule 19(a), Supreme Court Rules, 28 U.S.C.A., Part V, p. 30

QUESTIONS PRESENTED

THE QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS:

1. WHERE AN ATTORNEY HAS BEEN CONVICTED OF A FELONY AND, UNDER THE APPLICABLE PROVISIONS OF THE INTEGRATION RULE OF THE FLORIDA BAR, ASSERTS IN HIS RESPONSE TO A PETITION FOR HIS SUSPENSION, WITHOUT ANY TRAVERSE THAT HE IS INNOCENT OF THE FELONY, THAT HIS CONVICTION WAS UNJUST AND RESULTED FROM UNLAWFUL AND PREJUDICIAL CONDUCT ON THE PART OF THE TRIAL COURT, WHICH PREJUDICIAL MATTERS ARE SET FORTH IN THE RESPONSE, AND WHERE THE RESPONSE FURTHER SPECIFIES MANY PREJUDICIAL ERRORS WHICH OCCURRED DURING THE TRIAL, WHICH HAVE BEEN HELD BY PRIOR ADJUDICATIONS OF FEDERAL APPELLATE COURTS TO BE REVERSIBLE ERROR, DOES NOT AN INDEFINITE SUSPENSION WITHOUT AN EVIDENTIARY HEARING DEPRIVE HIM OF DUE PROCESS OF LAW IN VIOLATION OF THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. WHERE AN ATTORNEY HAS BEEN CONVICTED OF A FELONY AND, UNDER THE APPLICABLE PROVISIONS OF THE INTEGRATION RULE OF THE FLORIDA BAR FOR HIS SUSPENSION, SEEKS SUFFICIENT TIME TO OBTAIN A TRANSCRIPT OF THE TRIAL IN WHICH HE WAS CONVICTED, DOES NOT THE DENIAL OF THIS OPPORTUNITY OF AN EVIDENTIARY HEARING AND THE ATTORNEY'S SUSPENSION DURING THE OUTCOME OF HIS CRIMINAL APPEAL DEPRIVE HIM OF HIS

RIGHT TO BE HEARD, AND TO PRESENT EVIDENCE IN HIS BEHALF, IN VIOLATION OF THE VI AND XIV AMENDMENTS OF THE FEDERAL CONSTITUTION, AND OF HIS RIGHT TO PRACTICE LAW AND EARN A LIVELIHOOD FOR HIMSELF AND HIS FAMILY, IN VIOLATION OF DUE PROCESS OF LAW UNDER THE V AND XIV AMENDMENTS TO THE FEDERAL CONSTITUTION?

3. WHERE RULE 11.07, INTEGRATION RULE OF THE FLORIDA BAR, PROVIDES FOR THE SUSPENSION OF AN ATTORNEY CONVICTED OF A FELONY PENDING HIS APPEAL BUT DOES NOT PROVIDE SAID ATTORNEY A HEARING AND OPPORTUNITY TO PRESENT WITNESSES AND EVIDENCE TO EXPLAIN THE CIRCUMSTANCES AND IN MITIGATION, IS NOT SAID RULE UNCONSTITUTIONAL AND IN VIOLATION OF THE V, VI AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION?

4. WHERE RULE 11.07, INTEGRATION RULE OF THE FLORIDA BAR, PROVIDES FOR THE SUSPENSION OF AN ATTORNEY CONVICTED OF A FELONY, PENDING HIS APPEAL (AND FURTHER PROVIDES THAT HIS SUSPENSION SHALL BE EFFECTIVE AFTER HIS CONVICTION IS REVERSED AND UNTIL HIS CRIMINAL CASE IS FINALLY DISPOSED OF IN HIS FAVOR), IS NOT SAID RULE UNCONSTITUTIONAL AND IN VIOLATION OF THE V AND XIV AMENDMENTS TO THE FEDERAL CONSTITUTION IN THAT IT PERMITS THE SUSPENSION TO REMAIN IN EFFECT AFTER THE CAUSE THEREFORE HAS BEEN REMOVED AND, THUS, DENIES HIM HIS PRESUMPTION OF INNOCENCE WHICH ARISES AGAIN AFTER REVERSAL OF THE CONVICTION. FUR-

THER, IS NOT AN ORDER OF THE SUPREME COURT OF FLORIDA ENTERED PURSUANT TO THE AFORESAID RULE UNCONSTITUTIONAL WHEN IT PROVIDES THAT A CONVICTED ATTORNEY WHOSE CONVICTION IS ON APPEAL SHALL BE SUSPENDED UNTIL FURTHER ORDER OF THE COURT WHERE THE RULE ITSELF PROVIDES THAT SUCH SUSPENSION SHALL BE TERMINATED UPON THE FINAL DISPOSITION OF THE CRIMINAL CASE IN SAID ATTORNEY'S FAVOR AND, THUS, IS AN INDETERMINATE SENTENCE OF SUSPENSION, IN VIOLATION OF DUE PROCESS OF LAW CONTRARY TO THE V AND XIV AMENDMENTS TO THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL AND STATUTORY PROVISIONS

THE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH ARE INVOLVED IN THIS CASE ARE AS FOLLOWS:

1. Amendment V. Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (United States Constitution)

2. Amendment VI. Jury trial for crimes, and procedural rights. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (United States Constitution)

3. Amendment XIV. §1. Citizenship rights not to be abridged by states. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (United States Constitution)

4. INTEGRATION RULE OF THE FLORIDA BAR, 225 So.2d 881 (1969) *RULE 11.07: DISCIPLINE UPON CONVICTION* (1) *Determination or judgment of guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this State, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof

shall transmit a certified copy of such determination or judgment to the Clerk of this Court and to the Executive Director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(a) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director. An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the tenth day following the entry of judgment of guilt, the suspension shall remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of the trial court in the criminal proceedings, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods of appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided. (3) *Suspension by judgment (other than by state court).* If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition. (4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The Florida Bar may thereafter petition the Supreme Court for issuance of a notice to the convicted attorney to show cause why appropriate disciplinary judgment should not be entered. The respondent attorney may, within fifteen (15) days, file his return with the Clerk of the Supreme Court. The Court shall direct such further proceedings as may be appropriate.

STATEMENT OF THE CASE AND FACTS

1. Petitioner, ELI S. JENKINS, III, an attorney in St. Petersburg, Florida, was convicted in the United States District Court, Middle District of Florida, on an indictment charging a violation of Title 18, §2422, U.S. C.A. He immediately appealed and superseded said conviction.

2. Thereafter The Florida Bar filed a petition for his suspension under Rule 11.07(3) of the Integration Rules of The Florida Bar. Pursuant thereto Petitioner filed a Response asking that said suspension be held in abeyance pending the outcome of his appeal. Petitioner, in his Response, requested an opportunity to obtain the transcript of his trial to present to the Supreme Court of Florida, as evidence to show cause why he should not be suspended from the practice of law during the pendency of his appeal to the Fifth Circuit Court of Appeals. No evidentiary hearing was provided. Brief oral argument was allowed (15 minutes) on the Bar's Petition and the Response thereto. On April 7, 1970, the Supreme Court of Florida suspended Petitioner from the practice of law until the further order of the court. Petition for Rehearing Or, In The Alternative, For Stay Order was denied May 1, 1970. The orders of the Supreme Court of Florida do not state the grounds upon which they are based.

Petitioner is diligently prosecuting his appeal from his felony conviction.

STAGE OF PROCEEDINGS WHEREIN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

Paragraph 12 of Petitioner's Response is follows:

> "12. Under Florida Integration Rule 11.07(3) it is not mandatory that the Respondent be suspended upon his conviction. This rule was in this form conceived and promulgated in order to afford protection to attorneys who are convicted of felonies in courts other than the courts of the State of Florida. It is respectfully urged that this rule should be construed in such a fashion as to protect attorneys from suspension unless the full record of conviction is produced and establishes criminal violation of the attorney-client relationship or gross moral turpitude; or that said conviction is final when said attorney is contesting both the conviction and the petition of the Bar.
>
> WHEREFORE, in view of the matters set forth in this Response, Respondent respectfully requests the indulgence of the Supreme Court of Florida by the postponement of a consideration of the Bar's Petition until after the decision of the Fifth Circuit Court of Appeals above referred to." (A-9-10)

Said Federal questions were further raised in Petition For Rehearing as follows:

> "3. This Court has overlooked and failed to consider that due process of law requires this Court, or a hearing officer of this Court, to give Respondent an opportunity to be heard and to present witnesses and evidence on the nature and the quality of the conviction which is the sole basis for the disciplinary action taken by this Court in its Order of April 7, 1970. That neither Rule 11.07, Integration Rule of The Florida Bar, nor the Petition filed

against Respondent by the Bar, tendered to him an opportunity to present evidence and witnesses. See *Florida Bar v. Fussell*, 179 So.2d 852 (Fla. 1965) in which this Court held that due process of law required an opportunity to be heard by witnesses and to present evidence must be expressly tendered unless waived in a case where the lawyer's conviction had become final. This Court overlooked that in *Fussell*, supra, it held that while a judgment of guilt concludes proof of the commission of the act, it does not in and of itself mandate any particular disciplinary action. This Court further overlooked that in *Fussell*, supra, it held the right to practice law has the characteristics of property that should not be withdrawn save by proper application of the traditional concepts of due process, one of which is the opportunity to be heard and to present witnesses and evidence before any individual, regardless of his offense, is subjected to the disciplinary exercise of governmental power.

The Court overlooked and failed to consider that the only hearing ever tendered to Respondent was a 15-minute argument at which Respondent was not tendered the opportunity to call witnesses and present evidence as to the quality of his conviction and the probability of its reversal nor did he waive that right. The Court overlooked that, on the contrary, Respondent in paragraph 12 of his Response urged upon this Court that no action should be taken against him until he had a chance to produce a transcript of the proceedings resulting in the conviction. This Court overlooked and failed to consider that the summary nature of Respondent's suspension violates the due process principles as laid down in *Slochower v. Board of Higher Education of the City of New York*, 350 U. S. 551, 100 L.Ed. 692, 76 S.Ct. 637, and that such proceedings are fraught with the hazards of summary action pointed out by this Court in *In Re The Integration Rule of the Florida Bar*, 103 So.2d 873.

The Court overlooked and failed to consider that although Respondent immediately ordered a transcript of the record of his conviction, he has not yet been able to receive it from the Court Reporter and that suspension of Respondent prior to the time he has a fair chance to present this transcript or such portions thereof that clearly show the nature and quality of the conviction and the probability of reversal, violates due process of law as laid down by this Court in *Fussell*, supra. Respondent now, therefore, respectfully urges this Court to withhold its final Order of Suspension until Respondent can secure from the Court Reporter, who is preparing the record, and present the relevant portions thereof on the quality and nature of the conviction and the probability of reversal of the same.

While Respondent realizes there has been a change in the rules since the time of the *Fussell* case, supra, and that the Board of Governors under the old Rule 11.08 of the Integration Rule sat in the place where this Court now sits under Rule 11.07, this Court should not apply any less rigid standards of due process of law to itself that it did to the Board of Governors in *Fussell*, supra. Respondent, therefore, respectfully requests that this Court extend to Respondent, en banc, an opportunity to present the transcript of his conviction and witnesses to this Court or to a Referee designated by this Court before making any Order of Suspension final.

* * * * *

9. The Court overlooked and failed to consider that the effect of its Order in this case is to construe Rule 11.07 to require suspension following

conviction regardless of the circumstances or nature of the conviction, which construction Respondent submits is unconstitutional especially in that

(a) The Order of Suspension deprives Respondent of the property right he has in his law license and of his privilege to practice law without due process of law in violation of the 5th Amendment to the United States Constitution as made binding upon the States by the 14th Amendment to the United States Constitution and in violation of the Florida Constitution.

(b) That said Order of Suspension and this Court's construction of the Rule deprives Respondent of the full effect of his right to appeal and to supersede the conviction in violation of due process of law as guaranteed by the United States and Florida Constitutions and is such construction of the Rule as would require suspension without regard to the circumstances of any case.

(c) The Court's Order of Suspension is 'until further order from this Court' which is broader than the provisions of Rule 11.07 itself which authorizes a suspension in case of a conviction until final disposition of the criminal case. That such Order is in effect an indefinite sentence of suspension which extends such suspension even beyond an acquittal. The Court failed to consider that said Rule itself which permits suspension beyond the reversal of the conviction upon which the suspension is supposedly based is unconstitutional as requiring a suspension without any basis therefor, the supporting grounds having been removed by a reversal and deprives Respondent of his rights without due process of law in violation of the 5th Amendment of the United States Constitution and the 14th Amendment of the United States Constitution.

Suspension continuing after reversal is a fundamental violation of the presumption of innocence afforded each person by due process of law.

WHEREFORE, Respondent respectfully requests this Court to reconsider its Order of April 7, 1978, to rehear this cause with argument and to hold in abeyance any Order of Suspension until a decision is reached in Respondent's criminal cause by the 5th Circuit Court of Appeals or, in the alternative, that this Court hold this matter in abeyance until Respondent is tendered an evidentiary hearing and has the opportunity to file before this Court, or its Referee, such portions of the transcript of his Federal trial as clearly support the allegations of his Response."

ARGUMENT

In the interest of brevity the questions presented, 1 through 4, pages 3 through 5, supra, will not be restated in the argument section of this petition.

AS TO QUESTION 1

On March 12, 1970, The Florida Bar filed with the Supreme Court of Florida its petition seeking Petitioner's suspension from the law practice until further order of that court. Said petition is predicated entirely upon Petitioner's recent conviction in the United States District Court in Tampa, Florida, for violation of Title 18, §2422, U.S.C.A. (A-1-2).

Petitioner's timely Response (1) admitted his conviction; (2) set up his immediate appeal and supersedeas of his conviction to the Fifth Circuit Court of Appeals; (3) asserted his innocence of the felony of which he was convicted; (4) asserted his conviction was a result of prejudicial misconduct on the part of the trial court. (Paragraph 10, Petitioner's Response, A-8). In addition, Petitioner's Response set forth several fundamental errors which occurred during his criminal trial which Federal appellate courts, including the Fifth Circuit Court of Appeals, have previously adjudged to be reversible error. (Paragraphs 5, 6, 7, 8 and 9 of Petitioner's Response, A-6-9, and Petitioner's Motion for New Trial, grounds 1-35, inclusive, A-13).

Petitioner's Response sought to have the Supreme Court of Florida take under advisement and hold in abeyance the Bar's petition for his suspension pending the outcome of his criminal appeal and, in addition,

sought to delay said proceedings until a full record and transcript of his criminal conviction could be procurred and produced before the Court (A-6).

Without opinion, the Supreme Court suspended Petitioner until further order of the court. (A-19). Petitioner's timely Petition For Rehearing (A-20) was denied without opinion (A-29). The Petition for Rehearing set forth in great particularity Petitioner's claim that due process of law required that an evidentiary hearing be tendered to him unless waived by him before he could be suspended. (A-20).

In overruling this contention under the Federal Constitution, the Supreme Court of Florida has decided that Federal procedural due process does not apply to the suspension of attorneys pending their appeal from a conviction, no matter how unjust said conviction may be, a question never passed upon directly by this Court. In addition, the Supreme Court of Florida's decision is not in accord with analagous decisions of this Court which are applicable to the decision and which require Federal procedural due process to be observed in State disciplinary and administrative proceedings against the rights and privileges of lawyers in all 50 states as well as many other professional and non-professional people. In *disbarment* cases as opposed to *suspension* pending an appeal of the criminal case, this Court has held that disbarment is a punishment or penalty imposed on the lawyer and entitles him to procedural due process. *In re Ruffalo,* 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222 (1968). This Court, in 1872, held that in order for an attorney's license to practice to be taken from him (as opposed to suspension pending an appeal) that a rule of natural justice required that he be given notice and an

ample opportunity of explanation and defense. The Court stated that the attorney's license to practice his profession was such that to take it from him required the same proceedings as would be required to take his real or personal property or other franchise and further held that the opportunity to explain and defend were jurisdictional to the power of a court to discipline the attorney by taking away his privilege to practice his profession. *Bradley* v. *Fisher,* 13 Wall 335 (80 U.S. 646), 20 L.Ed. 646 (1872).

Petitioner's Response, untraversed by the Bar, and, therefore, admitted, set forth that the effect of an order of suspension pending the outcome of his appeal from his recent felony conviction would be as harsh as and have the same effect as disbarment because he would be destroyed professionally and financially due to the fact that the appellate procedure is so slow that his conviction could not be reversed for months. (A-9).

In *In re Oliver,* 333 U.S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948), this Court held:

> A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and that his rights include *as a minimum* a right to examine the witnesses against him, *to offer testimony* and to be represented by counsel. (emphasis supplied).

In re Oliver, supra, was cited by this Court for authority for the procedural due process required in *In re Ruffalo, supra.* Indeed, this Court as recently as March 24, 1970, in *Goldberg* v. *Kelly, et al,* (not yet officially reported but found in 38 L.W. 4223) held that

Federal constitutional due process required an evidentiary hearing be afforded to a welfare recipient before the termination of benefits to that recipient by a State. This Court held that *Kelly's* constitutional challenge could not be answered by an argument that public assistance benefits are a *privilege* and not a right.

In this connection Petitioner's Response, untraversed by the Bar, asserts he has a substantial investment in his law office and law practice and that he, his wife and four minor children were all dependent on Petitioner's earnings from the practice of law for their support. Contrast this *earned* privilege to make a livelihood with *Kelly's* mere privilege to draw welfare assistance. In *Goldberg*, supra, this Court said that only a *pre-termination* evidentiary hearing would satisfy the requirements of procedural due process. This requirement was not afforded Petitioner.

AS TO QUESTION 2

One of the main thrusts of Question 2, towit: the requirement of an evidentiary hearing pre-termination of Petitioner's right to practice law, is embraced in Question 1 and nothing further need be added on that aspect of the question. We pause to point out under Question 2 that Petitioner complains about the Florida Supreme Court's failure to grant him an evidentiary hearing after he had requested it, whereas Question 1 dealt only with the failure to afford one where it had not been waived.

Petitioner conceives that additional due process questions arise under Question 2, i.e., the right to compulsory process for witnesses, the right to present evi-

dence and witnesses touching on the circumstances of Petitioner's conviction of felony and in mitigation of the disciplinary procedure to be invoked against him by the Supreme Court of Florida. In this connection it is important to note that Petitioner's Response, paragraph 12 (A-9) asked that suspension be withheld until the full record of his conviction could be produced. It is also important to remember that the fundamental errors of the prejudicial misconduct of the court and the prejudicial errors of law alluded to in argument under Question 1 above were among the important things Petitioner was seeking an evidentiary hearing on. It seems evident that due process of law and fundamental fairness would not permit the suspension of a lawyer convicted of a felony, which suspension must necessarily last for months, if he could prove, in fact, at an evidentiary hearing that he was innocent of the crime for which he was convicted, and present convincing evidence explaining his conviction, in spite of his innocence, i.e., the prejudicial misconduct of the trial court and the misapplication of the law in the trial court so as to permit the jury to reach a verdict of guilty against a man without the essential elements of the offense having been proven.

This Court in *Washington v. Texas,* 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967) stated:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

This Court went on to say in *Washington,* supra:

> . . . it could hardly be argued that a State would not violate the clause* if it made all defense testimony inadmissible as a matter of procedural law.

(*The VI Amendment right to compulsory process for witnesses in behalf of a defendant.)

Petitioner does not challenge the right of the Supreme Court of Florida to suspend him from the law practice pending the outcome of his criminal appeal. He does vigorously challenge the right of the court to suspend him without an evidentiary hearing, especially where as in this case, he is requesting a hearing and offering to prove matters and circumstances which would certainly justify that court in delaying his suspension pending the outcome of his appeal.

AS TO QUESTION 3

All that has been said under Questions 1 and 2 is apropos to this question. Petitioner adds only that he contends that the provision for the evidentiary hearing, pre-termination of his right to practice law, must be set forth in the rule itself in order to save it from the constitutional infirmaties pointed out in Questions 1 and 2 and that as the rule does not contain such provisions (p. 6-8), the procedure under which the Petitioner was suspended is a nullity.

AS TO QUESTION 4

Rule 11.07(3) of the Integration Rule of The Florida Bar provides that conviction of an attorney in any court other than that of the State of Florida (as in the instant case by a Federal court) is ground for the suspension of an attorney. Rule 11.07 (2)(b) provides that if the attorney takes appeal and on review his cause is remanded for further proceedings, the suspension shall continue until the final disposition of the criminal cause.

Inasmuch as the conviction is the sole basis for Petitioner's suspension, he earnestly contends that the Integration Rule of The Florida Bar which provides for his suspension to remain in effect beyond a reversal of his conviction is unconstitutional in that it deprives him of due process of law under the V and XIV Amendments to the Federal Constitution. In deciding this Federal question as it applies to *suspension* of attorneys under conviction as opposed to *disbarment* of attorneys, the Supreme Court of Florida has passed upon a Federal question not previously passed on by this Court. It has also passed upon this question in conflict with analagous applicable pronouncements of this and other Federal Courts. In the case of a disciplinary proceeding against a lawyer for a conviction of a felony the Seventh Circuit Court of Appeals held in *In re Echeles,* 374 F.2d 780 (C.A. 7th, 1967) that a suspension predicated upon the conviction alone fell with the reversal of the conviction on the theory that "the reversal of the 1964 judgment destroys it as support for a suspension order". That Court specifically did not pass upon the question of whether the lawyer could be suspended *after a hearing.* The Florida rule provides for the continuance of suspension supposedly based solely on the conviction even where that conviction ceases to exist by virtue of reversal, thus clearly denying an attorney his due process rights as was the case in *Echeles,* supra. Clearly once a cause is reversed a defendant is entitled to the presumption of innocence which is an integral part of due process of law.

The order of the Florida Supreme Court (A-19) suspends Petitioner even beyond the period its own rule permits. It is an indefinite suspension, whereas even the rule provides for termination of suspension upon

final disposition of the cause in favor of the lawyer. Cases holding that a penalty or punishment must be specific within prescribed limits are legion.

The Arizona Supreme Court pointed out in *In re Metheany*, 449 P.2d 609 (1969), there is no practical difference between disbarment and suspension save duration. That Court said a disbarment was merely a permanent suspension and a suspension was a temporary disbarment.

The effect of the judgment sought to be reviewed herein (A-19) is in effect a "disbarment" at the pleasure of the Court. Such summary action, extending beyond the rule authorizing the court to suspend, is violative of fundamental fairness and due process of law.

CONCLUSION

Procedurally this case is ripe for adjudication. Fundamental Federal constitutional questions are presented and an adverse decision was made which has worked an injustice on Petitioner. More importantly, an opinion and decision by this Court on these questions will serve as the future guide in the administration of justice in judicial disciplinary and administrative proceedings against lawyers in all 50 states as well as many other professional and non-professional people.

Respectfully submitted,

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TERRY FURNELL
322 S. Osceola Ave.
Clearwater, Florida
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari To The Supreme Court of Florida was furnished, by mail, to the Hon. Marshall R. Cassedy, Executive Director, Florida Bar, Florida Bar Center, Tallahassee, Florida, this 7 day of July, 1970.

Attorney for Petitioner

APPENDIX

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Petitioner

v.

ELI S. JENKINS III

Respondent

PETITION FOR SUSPENSION

The Florida Bar petitions this Honorable Court to suspend Eli S. Jenkins III from the practice of law in Florida and says:

1. The Supreme Court of Florida has exclusive jurisdiction over the practice of law and attorneys in Florida.

2. Eli S. Jenkins III is a member of The Florida Bar in good standing, whose address is P. O. Box 740, 447 3rd Avenue North, St. Petersburg, Florida 33731.

3. On March 11, 1970 in Case No. 68-67-Cr-T (*United States of America v. Eli S. Jenkins*) Eli S. Jenkins was adjudged guilty of a violation of the White Slave Traffic Act, in violation of Title 18, Section 2422, United States Code. Said offense is a felony. The determination of guilt was made by the United States District Court for the Middle District of Florida, Tampa Division. A certified copy of the Judgment and Commitment of the United States District Court is attached to this Petition.

4. The Eli S. Jenkins mentioned in paragraph 3 of this Petition is the same person as Eli S. Jenkins III, a member of The Florida Bar.

WHEREFORE, The Florida Bar requests this Honorable Court to suspend Eli S. Jenkins from the practice of law in Florida under the provisions of Article [illegible](3) of the Integration Rule of The Florida Bar, until further Order of this Court.

RICHARD C. MCFARLAIN
Assistant Executive Director
The Florida Bar
Tallahassee, Florida 32304

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Petition and a copy of the Judgment and Commitment in Case No. 68-67-Cr-T (*United States of America v. Eli S. Jenkins*) have been served on Eli S. Jenkins III by certified mail, return receipt requested, at his official address on March 12, 1970.

RICHARD C. MCFARLAIN

certified mail
#19576, RRR

Judgment and Commitment (Rev. 2-60)

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA - TAMPA DIVISION

UNITED STATES OF	)	FILED
AMERICA	)	TAMPA, FLA.
v.	)	No. 68-67-Cr-T. MAR 11 '70
	)	WESLEY R. THIES
ELI S. JENKINS	)	CLERK

On this 11th day of March, 1970 came the attorney for the government and the defendant appeared in person and with counsel, Mark Hawes, Terry Furnell and C. J. Abernathy.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty and a Jury verdict of guilty of the offense of violation of the White Slave Traffic Act; in violation Title 18, Section 2422, U.S.C. as charged in 1 count of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four Years, and that the defendant shall become eligible for parole at such time as the Board of Parole may determine, 18 U.S.C. 4208(a)(2), or until the defendant is otherwise discharged as provided by law.

IT IS ADJUDGED that the United States of America do have and recover of and from the defendant the sum of $5,000.00 as a fine imposed herein.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

/s/ Fred J. Nichols, Jr.
United States District Judge

I certify the foregoing to be a true and correct copy of the original.

Wesley R. Thies, Clerk
United States District Court
Middle District of Florida

By: /s/ Lester E. Gilbert
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, :

Petitioner, :

vs. :

ELI S. JENKINS III, :

Respondent. :

RESPONSE TO PETITION OF THE FLORIDA BAR

Comes now the Respondent, ELI S. JENKINS III, by and through his undersigned counsel, and files this his Response to the Petition of The Florida Bar and says:

1. Respondent admits the allegations contained in paragraphs 1 through 4 of the Petition and for further answer says:

2. Respondent is 38 years of age and has practiced law continuously in the State of Florida for the last 14 years.

3. Respondent is the senior partner in the firm of Jenkins, Abernathy & Dugan, which firm has numerous clients both in civil and criminal cases. That most of said firm's clients selected said firm because of the standing and reputation of Respondent as a trial lawyer and, in particular, as a criminal defense lawyer, and in practically every case of a criminal client your Respondent is personally responsible for said case or is responsible for the supervision of the handling of said case. That serious hardship to Respondent's clients, as well as the Respondent, would result if he were to be suspended and it became necessary for his clients to change attorneys. That Respondent has personally prepared most of his client's criminal cases for presenta-

tion to the Courts, including a capital case expected to be tried in the near future, and requirement of his withdrawal by suspension would seriously affect the rights of his clients.

4. That immediately after Respondent was adjudicated and sentenced as referred to in the Petition, and on the same day, this Respondent filed his Notice of Appeal to the United States Court of Appeals for the Fifth Circuit and posted supersedeas bond in the amount of $1,500.00 which stayed all proceedings and suspended the said adjudication of guilt pending the outcome of said appeal. That on March 16, 1970, Respondent mailed to the Clerk of the District Court, Middle District of Florida, his written Directions to the Clerk and the Court Reporter for the preparation of the record and transcript on appeal. That Respondent's counsel has instructed the Court Reporter to prepare the transcript at the earliest possible moment, it being Respondent's intention of bringing said appeal on for final determination before the Fifth Circuit Court of Appeals at the earliest possible time.

5. Respondent knows and represents to the Court that he is innocent and that he and his counsel verily believe and hope that said conviction will be reversed by the Court of Appeals. Although Respondent knows that this Court cannot pass upon said appeal, some of the fundamental contentions embraced in said appeal are set forth herein so that this Court can determine that said appeal presents fundamental questions and cannot by any stretch of the imagination be termed frivolous nor taken merely for the purpose of delaying the Respondent's final confrontation with the judgment of the United States District Court. Among Respondent's fundamental contentions on appeal are that "the District Court erred in allowing the Government to question the witness, Richard Carr, in the presence of the jury, knowing full well that said witness would invoke his privilege under the Fifth Amendment to the Constitution of the United States of America", thereby causing said witness to invoke his privilege in the presence of

the jury, to the prejudice of the defendant. (Motion For New Trial, Ground 9).

"The District Court erred in allowing the Government to question the witness, Robert Manderscheid, in the presence of the jury, knowing full well that said witness would invoke his privilege under the Fifth Amendment to the Constitution of the United States of America", thereby causing said witness to invoke his privilege in the presence of the jury, to the prejudice of the defendant. (Motion For New Trial, Ground 10).

See *San Fratello v. United States*, 340 F.2d 956 (C.A. 5th Circuit), cert. denied 17 L. Ed. 2d 303, conviction reversed by the Fifth Circuit Court of Appeals for the same error.

6. After the witness, Diane Blaisdell, had testified before the Court and trial jury for one day, the witness' mother and 2½ year old daughter were killed in an accidental fire in New York. When the Court learned of this tragedy, the Court, without notice to counsel for the defendant, sequestered the jury, stating that if the jury learned of this tragedy it would be grounds for a mistrial. The Court thereafter overruled Respondent's Motion For Mistrial because of the unfair position defendant and his counsel were placed in to cross-examine this witness under these circumstances. The Court kept said jury sequestered for over a month thereafter and when the verdict was in, the Court overruled and denied Respondent's request that the jury be polled to determine whether or not the jury or any member thereof had in any fashion obtained the information that the witness, Diane Blaisdell's mother and child had been killed in a fire during the progress of this cause.

7. The testimony of the witness, Diane Blaisdell, on whose testimony the Government's case rested, was not recorded before the Grand Jury. Defendant's counsel subpoenaed as witnesses for the defense at his trial members of the Grand Jury and the trial court quashed

all of said subpoenas, expressing the view that Grand Jurors could never be called, thereby denying this Respondent his rights under the Florida and the Federal Constitution to compulsory process of the Court for the attendance of witnesses in his behalf.

8. The District Judge denied Respondent's pretrial and during trial motions to compel the Government to turn over exculpatory evidence with the result that the records of the Albany New York Medical Center psychiatric ward concerning the witness, Diane Blaisdell, were withheld from the defense until the Government had completed its case in chief and the witness, Diane Blaisdell, had testified fully and this in spite of the fact that said records when they were made available to the defense formed the basis for defense physicians to testify that said witness was actually incompetent to take the oath, a question which your Respondent could only have raised at the time said witness was offered as a witness.

9. The District Judge overruled and denied Respondent's several requests to have the witness, Diane Blaisdell, examined by an independent psychiatrist of the Court's choice under Rule 28 of the Federal Rules of Criminal Procedure.

10. The District Court erred on several occasions when in the presence of the jury he admonished chief counsel for your Respondent that he was unnecessarily dragging out said case and conducting the defense improperly and on one occasion after counsel had been thus rebuked and asked permission to approach the bench for the purpose of moving for a mistrial under the procedures previously established by the Court, when counsel was in the process of approaching the bench and was within 3 to 5 feet of the end of the jury box, the District Judge said so that counsel could hear it in the vicinity of the jury box "You can make all of the God-damn mistrial motions you want to" and there-

after, after the motion was made to the bench out of the hearing of the jury, then the Court irritably and very audibly and heatedly said "Your motion is denied". Attached hereto and made a part hereof by reference as fully as though set forth herein in haec verba is a true and correct copy of Respondent's Motion For New Trial filed in the United States District Court for the Middle District of Florida, Tampa Division, and the Affidavit of Respondent's counsel.

11. Your Respondent lives in St. Petersburg with his wife and his 4 children all of whom are dependent upon Respondent's earnings from the practice of law for their support. That Respondent has a substantial investment in his law office and law practice. That the effect of an order of suspension on Respondent would be the same and as harsh as disbarment in that the practical effect thereof would be to destroy Respondent professionally and financially and this in spite of the fact that his conviction ought to be and might in a matter of months be upset.

12. Under Florida Integration Rule 11.07(3) it is not mandatory that the Respondent be suspended upon his conviction. This rule was in this form conceived and promulgated in order to afford protection to attorneys who are convicted of felonies in courts other than the courts of the State of Florida. It is respectfully urged that this rule should be construed in such a fashion as to protect attorneys from suspension unless the full record of conviction is produced and establishes criminal violation of the attorney-client relationship or gross moral turpitude; or that said conviction is final when said attorney is contesting both the conviction and the petition of the Bar.

WHEREFORE, in view of the matters set forth in this Response, Respondent respectfully requests the indulgence of the Supreme Court of Florida by the postponement of a consideration of the Bar's Petition until after the decision of the Fifth Circuit Court of Appeals above referred to.

Respectfully submitted,

MARK HAWES
Counsel for Respondent

ELI S. JENKINS III
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy hereof has been furnished, by mail, this the day of March, 1970, to the Hon. Richard McFarland, Florida Bar Association, Tallahassee, Florida.

Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, :

Petitioner, :

vs. :

ELI S. JENKINS III, :

Respondent. :

AFFIDAVIT

COUNTY OF HILLSBOROUGH)
STATE OF FLORIDA) ss

Comes now MARK HAWES, being first duly sworn, deposes and says:

1. That he is Respondent's counsel in the above entitled matter. That he was Respondent's chief defense counsel in the case of United States of America v. Eli Jenkins in the United States District Court for the Middle District of Florida in the cause alluded to in the Petition previously filed herein.

2. That the things and matters set forth in the attached Motion For New Trial and in this Response to the Petition of The Florida Bar are true and correct. That the appeal to the Fifth Circuit Court of Appeals is filed in good faith and is in counsel's opinion meritorious and should end in a reversal of Respondent's conviction.

3. That Respondent's Response to the Petition of The Florida Bar is filed in good faith not for the purpose of mere delay or harassment of the Bar and that the things and matters set forth in said Response are true and correct.

4. That he is personally familiar with Respondent's trial schedule and knows that Respondent is handling many criminal and civil matters now pending and verily believes that a suspension prior to a determination of this appeal hereinabove described would seriously hamper the rights of Respondent's clients.

5. That he verily believes that this Court should, in the exercise of its discretion, delay and postpone consideration of the Petition filed herein by The Florida Bar until after the decision of the Fifth Circuit Court of Appeals in the now pending appeal.

/s/ Mark Hawes
MARK HAWES

Sworn to and subscribed before me this 19th day of March, A.D. 1970.

/s/ Dolores Garner
Notary Public

My Commission expires: May 18, 1970 (SEAL)

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES, :

Plaintiff, :

-vs- : No. 68-67-Cr.-T.

ELI JENKINS, :

Defendant. :

MOTION FOR NEW TRIAL

The defendant, Eli S. Jenkins, by counsel, and pursuant to Rule 33, Federal Rules of Criminal Procedure, moves for an order granting a new trial in the above-styled cause and alleges:

1. The verdict is contrary to the law.

2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The Court erred in denying the defendant's pretrial motion to dismiss for lack of a speedy trial, both at the time that it was urged and at each successive renewal thereof.

5. The Court erred in denying the defendant's motion to dismiss for failure to record the testimony of the witness Diane Blaisdell before the Federal Grand Jury which rendered an indictment in this case, or in the alternative, to allow the defendant a full discovery deposition of the witness.

6. The Court erred in failing to order produced for the defendant exculpatory evidence at a time beneficial in the defense of this case and specifically in refusing to order the production of the medical records of Diane Blaisdell compiled in the Albany Hospital, until a time after the witness Diane Blaisdell had been administered the oath and had testified at length.

7. The Court erred in denying the defendant's motion for judgment of acquittal at the close of the government's case.

8. The Court erred in denying the defendant's motion for judgment of acquittal at the close of all of the evidence.

9. The Court erred in allowing the government to question the witness Richard Carr in the presence of the jury, knowing full well that said witness would invoke his privilege of the Fifth Amendment to the Constitution of the United States of America, thereby causing said witness to invoke his privilege in the presence of the jury to the prejudice of the defendant.

10. The Court erred in allowing the government to question the witness Robert Manderschied in the presence of the jury, knowing full well that said witness would invoke his privilege of the Fifth Amendment to the Constitution of the United States of America, thereby causing said witness to invoke his privilege in the presence of the jury and to the prejudice of the defendant.

11. The Court erred in ordering the sequestration of the jury without notice to the defendant or counsel of the defendant.

12. The Court erred not only in sequestering the jury as aforesaid, but by the methods used to gather the jurors for sequestration.

13. The Court erred in refusing to grant the defendant's motion for mistrial following the unfortunate death of the mother and daughter of the witness Diane Blaisdell, which event occurred during the testimony of the said witness.

14. The Court erred in denying the defendant's request that the jury be polled after the verdict but before the discharge of the jury on the sole question of whether the jury had obtained in any fashion any information concerning the deaths of Diane Blaisdell's mother and child during this case.

15. The Court erred in denying the defendant's motion pursuant to Rule 28, Federal Rules of Criminal Procedure, requesting a full and fair psychiatric examination of the witness Diane Blaisdell.

16. The Court erred in denying the defendant's proffer of the witness David Allison.

17. The Court erred in admonishing chief counsel for the defendant in the presence of the jury, and informing the jury that the conduct of counsel was "improper".

18. The Court erred in refusing to grant the defendant's motion for mistrial following the admonition of counsel as aforesaid.

19. The Court erred in refusing to instruct the jury as requested in defendant's requested instructions numbered 2, 5, 6, 8, 9, 11, 12, 13, 14, 17, 19, 20, 21, 23 and 24.

20. The Court erred in giving government's requested instructions numbered 5, 7, 11, 13, 14, 15 and 19, in that in part said instructions were based upon authority under Section 2421, Title 18, United States Code, and not on authority of the offense charged, and further that said instructions taken as a whole effectively denied the

defendant the defense that the dominant motive or principal and compelling motive for the woman's travel was for legitimate or commendable reasons.

21. The Court erred in denying defendant's motion for a bill of particulars.

22. The Court erred in refusing to make available to the defendant the actual test results of psychological tests administered by the government witness Dr. Theodore Blau, except during cross-examination and then only in the court room.

23. The Court erred in commenting before the jury that chief counsel for the defendant was delaying the cross-examination of Dr. Coffer during said cross-examination.

24. The Court erred in denying the defendant's motion for mistrial following the Court's comment as aforesaid in paragraph number 23.

25. The Court erred in quashing the subpoenaes theretofore issued to certain of the grand jurors who returned the indictment herein and in ordering and directing that the defendant would not be permitted to subpoena any of such grand jurors at this trial.

26. The Court erred in denying the proffer of the defense witness, Dr. Dan Hellman, during the defendant's case in chief.

27. The Court erred in allowing counsel for the government to impeach government witnesses during the government's case in chief under the guise of refreshing their memory without a showing of hostility.

28. The Court erred in deciding what evidence was or was not exculpatory to the defendant by its own selection following in camera inspection of many documents including, but not limited to:

(a) Entire working file of the Federal Bureau of Investigation with reference to this cause;

(b) The raw file of the Federal Bureau of Investigation with reference to this case;

(c) The entire investigation file of the St. Petersburg Police Department in reference to this case and witnesses involved in this case.

(d) The investigative file of the Wackenhut Agency.

29. The Court Erred in instructing government counsel to advise previously-subpoenaed witnesses for the defendant that they need not honour the subpoenaes then outstanding and in force by order of the Honorable Wilson Warlick, thereby requiring the defendant to issue new subpoenaes for his witnesses, and tender additional fees to said witnesses.

30. The Court erred in repeatedly instructing the government's witness, Dr. Theodore Blau, that he need not confer with counsel for defense unless he so desired and in allowing government counsel to express to the witness in the presence of the Court, government counsel's preference that said witness not confer with the defense.

31. The Court erred in indicating to the jury his impatience with the defense during the second day of the presentation of the defendant's case in chief.

32. The Court erred in commenting to the jury after extensive psychiatric testimony regarding the witness, Diane Blaisdell, that "the defendant hasn't changed, even in light of such testimony. It isn't Diane Blaisdell, it's still Mr. Jenkins who is the defendant."

33. The Court erred in denying the defendant's motion to strike the testimony of Diane Blaisdell for the reason that she was not competent to testify and that her testimony was unbelievable as a matter of law.

34. The Court erred in stating before the jury that chief trial counsel for the defendant was trying to "run the Court".

35. The Court erred in placing the defendant in the position of abandoning his constitutional right to full and complete cross-examination of the witness Diane Feldman Blaisdell as to her motive, bias, prejudice and hatred for the defendant by directing that if such full cross-examination was made that the Court would deny defendant's motion for mistrial if the admittedly prejudicial information as to the unfortunate death of the witness' daughter and mother was elicited in such cross-examination.

WHEREFORE, defendant prays this Honorable Court grant him a new trial on the grounds hereinabove set forth.

I do hereby certify that a copy of the above and foregoing Motion For New Trial has been furnished to the Hon. Bernard Dempsey, Assistant U.S. Attorney, by hand, this 11th day of March, A.D. 1970.

/s/ Mark Hawes
MARK R. HAWES
310 N. Jefferson Street
Tampa, Florida 33602
Attorney for Defendant

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1970
TUESDAY, APRIL 7, 1970

THE FLORIDA BAR, **

Petitioner, **

vs. ** CASE NO. 39,489

ELI S. JENKINS III, **

Respondent. **

The petition for suspension filed by The Florida Bar is hereby granted and Eli S. Jenkins III, respondent, is hereby suspended from the practice of law in Florida until further order from this Court.

A True Copy
TEST:
(Seal) /s/ Sid J. White
Sid J. White
Clerk Supreme Court

CC: Hon. Richard C. McFarlain
Hon. Robert B. Kane
Hon. Mark Hawes
Hon. Eli S. Jenkins III

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1970

THE FLORIDA BAR, :

Petitioner,

vs. :

ELI S. JENKINS III, :

Respondent. :

PETITION FOR REHEARING

Respondent, ELI S. JENKINS III, through his undersigned counsel, files this Petition For Rehearing of the Court's Order of Suspension filed April 7, 1970, and shows unto the Court as follows:

1. The Court overlooked and failed to consider the fact that Petitioner's Response was not traversed by the Florida Bar and that the allegations contained therein must be taken by this Court as true. *Florida Bar v. Levinson*, 211 So. 2d 173, Text 174.

2. The Court overlooked or failed to consider that said Response asserts the Petitioner's innocence of the charge of which he has been convicted.

3. This Court has overlooked and failed to consider that due process of law requires this Court, or a hearing officer of this Court, to give Respondent an opportunity to be heard and to present witnesses and evidence on the nature and the quality of the conviction which is the sole basis for the disciplinary action taken by this Court in its Order of April 7, 1970. That neither Rule 11.07, Integration Rule of the Florida Bar, nor the Petition filed against Respondent by the Bar, tendered to him an opportunity to present evidence and witnesses.

See *Florida Bar v. Fussell,* 179 So. 2d 856 (Fla. 1965) in which this Court held that due process of law required an opportunity to be heard by witnesses and to present evidence must be expressly tendered unless waived in a case where the lawyer's conviction had become final. This Court overlooked that in *Fussell,* supra, it held that while a judgment of guilt concludes proof of the commission of the act, it does not in and of itself mandate any particular disciplinary action. This Court further overlooked that in *Fussell,* supra, it held the right to practice law has the characteristics of property that should not be withdrawn save by proper application of the traditional concepts of due process, one of which is the opportunity to be heard and to present witnesses and evidence before any individual, regardless of his offense, is subjected to the disciplinary exercise of governmental power.

The Court overlooked and failed to consider that the only hearing ever tendered to Respondent was a 15-minute argument at which Respondent was not tendered the opportunity to call witnesses and present evidence as to the quality of his conviction and the probability of its reversal nor did he waive that right. The Court overlooked that, on the contrary, Respondent in paragraph 12 of his Response urged upon this Court that no action should be taken against him until he had a chance to produce a transcript of the proceedings resulting in the conviction. This Court overlooked and failed to consider that the summary nature of Respondent's suspension violates due process principles as laid down in *Slochower v. Board of Higher Education of the City of New York,* 350 U.S. 551, 100 L.Ed. 692, 76 S. Ct. 637, and that such proceedings are fraught with the hazards of summary action pointed out by this Court in *In Re The Integration Rule of the Florida Bar,* 103 So. 2d 873.

The Court overlooked and failed to consider that although Respondent immediately ordered a transcript of the record of his conviction, he has not yet been able to receive it from the Court Reporter and that suspension of Respondent prior to the time he has a fair chance to

present this transcript or such portions thereof that clearly show the nature and quality of the conviction and the probability of reversal, violates due process of law as laid down by this Court in *Fussell*, supra. Respondent now, therefore, respectfully urges this Court to withhold its final Order of Suspension until Respondent can secure from the Court Reporter, who is preparing the record, and present the relevant portions thereof on the quality and nature of the conviction and the probability of reversal of the same.

While Respondent realizes there has been a change in the rules since the time of the *Fussell* case, supra, and that the Board of Governors under the old Rule 11.08 of the Integration Rule sat in the place where this Court now sits under Rule 11.07, this Court should not apply any less rigid standards of due process of law to itself that it did to the Board of Governors in *Fussell*, supra. Respondent, therefore, respectfully requests that this Court extend to Respondent, en banc, an opportunity to present the transcript of his conviction and witnesses to this Court or to a Referee designated by this Court before making any Order of Suspension final.

4. That numerous, fundamental and prejudicial errors occurred in the proceeding in which Respondent was convicted. This Court overlooked and failed to consider the nature of Respondent's conviction and the probability of reversal in that Respondent has demonstrated to this Court palpable and egregious errors in the trial court, which errors are as serious as would be the case of Respondent's conviction were based upon a "directed verdict of guilt" or based upon a conviction by a 10-man jury without his consent. In either of the above examples he would only be entitled to pursue the same remedy he now pursues, to wit: appeal to the Court of Appeals for the 5th Circuit and in such situation due process of law and fundamental fairness would certainly require a careful evaluation of the nature and quality of the conviction and the probability of reversal before any suspension. The untraversed allegations of the Response

are such as to clearly show justiciable issues on appeal. The Court failed to consider that the appeal taken is not frivolous and does raise grave constitutional issues and does show a high probability of reversal and this Court failed to consider that the circumstances of this case are such that the Court should exercise its discretion in withholding suspension until such fairly arguable issues can be fully and properly presented to the appropriate forum.

5. The Court failed to consider that its failure to exercise its discretion to withhold suspension in the above matter has deprived Respondent of due process of law and equal protection of the laws in this proceeding in that under the Rule herein, the nature and quality of the conviction and the probability of reversal are the only real issues upon which this Court's exercise of discretion can appropriately be based and such issues were not considered by the Court.

6. That grossly prejudicial conduct by the trial court in which the conviction occurred has been demonstrated to this Court and that this Court failed to consider how such conduct on the part of the trial judge was such as to show how Respondent, although innocent, could be and was convicted.

7. The Court failed to consider that Respondent has shown without traverse that the conviction was, in fact, a travesty on justice and that to suspend Respondent on the basis of such conviction would be to compound such travesty of justice.

8. The Court failed to consider or overlooked that in construing Rule 11.07 of Article XI of the Integration Rule this Court in *Levinson,* supra, held that while generally conviction of a felony should justify suspension until the blot of conviction is removed, that circumstances could vary situations and that Respondent has herein without traverse shown such circumstances.

9. The Court overlooked and failed to consider that the effect of its Order in this case is to construe Rule 11.07 to required suspension following conviction regardless of the circumstances or nature of the conviction, which construction Respondent submits is unconstitutional especially in that:

(a) The Order of Suspension deprives Respondent of the property right he has in his law license and of his privilege to practice law without due process of law in violation of the 5th Amendment to the United States Constitution as made binding upon the States by the 14th Amendment to the United States Constitution and in violation of the Florida Constitution.

(b) That said Order of Suspension and this Court's construction of the Rule deprives Respondent of the full effect of his right to appeal and to supersede the conviction in violation of due process of law as guaranteed by the United States and Florida Constitutions and is such construction of the Rule as would require suspension without regard to the circumstances of any case.

(c) The Court's Order of Suspension is "until further order from this Court" which is broader than the provisions of Rule 11.07 itself which authorizes a suspension in case of a conviction until final disposition of the criminal case. That such Order is in effect an indefinite sentence of suspension which extends such suspension even beyond an acquittal. The Court failed to consider that said Rule itself which permits suspension beyond the reversal of the conviction upon [illegible] suspension is supposedly based is unconstitutional as requiring a suspension without any basis therefor, the supporting grounds having been removed by a reversal and deprives Respondent of his rights without due process of law in violation of the 5th Amendment of the United States Constitution and the 14th Amendment of the United States Constitution. Suspension continuing after reversal is a fundamental violation of the presumption of innocence afforded each person by due process of law.

10. The Court overlooked that its Order of Suspension penalizes the Respondent herein for exercising his right to appeal the conviction in that his suspension until reversal, final exoneration and further Order of this Court, because of the voluminous nature of the transcript, will be 8 months to a year, and possibly much longer, whereas if Respondent abandoned his right to appeal, a substantially shorter Order of Suspension or other discipline might be levied. See *Florida Bar v. Fussell*, supra, in which a suspension of 6 months with automatic reinstatement was ordered by this Court for 2 Federal convictions of making a knowingly false statement in an application for home improvement loan. The convictions were for felonies under Federal law. The Court overlooked and failed to consider that the effect of the Order of Suspension is to enhance and increase the Respondent's punishment as far as his ability to earn a living through the practice of law is concerned and that such increased punishment occurs through his exercise of his right to appeal an illegal and unjust conviction. That such Order of Suspension entered in face of the uncontroverted allegations of the original Response places Respondent in the position of abandoning his right to appeal or suffering an increased punishment in violation of due process of law as guaranteed by the United States and Florida Constitutions.

WHEREFORE, Respondent respectfully requests this Court to reconsider its Order of April 7, 1970, to rehear this cause with argument and to hold in abeyance any Order of Suspension until a decision is reached in Respondent's criminal cause by the 5th Circuit Court of Appeals or, in the alternative, that this Court hold this matter in abeyance until Respondent is tendered an evidentiary hearing and has the opportunity to file before this Court, or its Referee, such portions of the transcript of his Federal trial as clearly support the allegations of his Response.

In the alternative, Respondent, ELI S. JENKINS III, through his undersigned attorney, petitions this Court for an Order staying the application and enforcement of the Judgment entered herein and in support thereof would show:

1. In the event this Court overrules and denies the Petition For Rehearing Petitioner, ELI S. JENKINS III, prays that this Court to consider the allegations therein contained which are by reference incorporated herein, together with the allegations hereinafter set forth, as a Petition For Stay Order.

2. That on the 7th of April, 1970, this Court entered its Order suspending Respondent from the practice of law until the further Order of the Court. Petitioner respectfully shows that it is his intention to prepare as soon as possible a Petition For Writ of Certiorari from the United States Supreme Court directed to this Honorable Court seeking to reverse and overturn the aforesaid Order of Suspension.

3. That this Petition For Stay Order is filed pursuant to the provisions of §21.01 (f) of Title 28, U.S.C.A. which contemplates that a Stay Order is available to stay the execution and enforcement of the Order of the Court appealed from and that an application for such stay should first be filed with this Court. That Petitioner has 90 days from the denial of his Petition For Rehearing in this Court to apply for a Writ of Certiorari in the United States Supreme Court.

4. Petitioner would show to this Court that substantial Federal questions are involved in the proceedings before this Court as shown by the Petition For Rehearing, which said questions will be submitted to the United States Supreme Court and which include the constitutionality of Rule 11.07 in its entirety as well as the other questions raised in the Petition For Rehearing.

5. Petitioner alleges that he has been aggrieved by this Court's Order of Suspension in violation of the rights guaranteed him by the United States Constitution as heretofore set forth in the Petition For Rehearing.

WHEREFORE, Petitioner prays this Honorable Court, in the event that rehearing on Petitioner's motion to modify or terminate his suspension is denied, enter its Order staying the effect of the aforesaid Order of Suspension for a reasonable length of time pursuant to the above cited section of the United States Code to afford Petitioner the opportunity to prepare and file a Petition For Writ of Certiorari in the United States Supreme Court and further providing in said Stay Order that in the event that said Petition For Writ of Certiorari is properly filed in accordance with the rules of the United States Supreme Court within the time afforded aforesaid, that the effect of said Order of Suspension be then further stayed until such time as the United States Supreme Court either (a) denies Petitioner's Petition For Writ of Certiorari, or (b) grant said petition and makes final disposition of said case on remand.

Respectfully submitted,

MARK HAWES — ELI S. JENKINS III
Attorney for Respondent/Petitioner
310 North Jefferson
Tampa, Florida

and

TERRY A. FURNELL
Furnell & White
322 S. Osceola Avenue, Clearwater, Florida

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the above and foregoing Petition For Rehearing has been furnished, by mail, to the Hon. Richard C. McFarland, Attorney for The Florida Bar, Tallahassee, Florida, this day of April, A.D. 1970.

Attorney

SUPREME COURT OF FLORIDA

CASE NO. 39,489

THE FLORIDA BAR

vs.

ELI S. JENKINS III

REPLY IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING

The Florida Bar files its Reply In Opposition To Respondent's Petition For Rehearing and says:

1. The Petition For Rehearing does not comply with Florida Appellate Rules 3.14(b) requiring petitions for rehearing to be concise.

2. Respondent's Petition For Rehearing does not comply with Florida Appellate Rule 3.14(b) in that it is argumentative.

3. Respondent's Petition For Rehearing does not comply with Florida Appellate Rule 3.14(b) in that it assumes new positions from those taken in the oral argument and the Petition.

4. To Grant the rehearing would be harmful to the dignity of the Court, the administration of justice and inexplicable in the eyes of the public.

WHEREFORE, The Florida Bar requests this Honorable Court to deny Respondent's Petition For Rehearing and requests that Eli S. Jenkins III be suspended from the practice of law until further order of this Court.

Respectfully submitted,

Richard C. McFarlain

(formal parts of Certificate of Service omitted)

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1970
FRIDAY, MAY 1, A.D. 1970

THE FLORIDA BAR, **

Petitioner **

-vs- ** CASE NO. 39,489

ELI S. JENKINS III **

Respondent **

On consideration of the Petition for Rehearing and Stay pending appeal to the United States Supreme Court,

IT IS ORDERED by the Court that the petition for rehearing and petition for stay be, and the same are hereby, denied.

A TRUE COPY,
TEST:
(Seal) /s/ Sid J. White
SID J. WHITE
CLERK SUPREME COURT

LIBRARY
SUPREME COURT, U. S.

SEP 3 1970

IN THE

United States Supreme Court

October Term, 1970

No. 381

ELI S. JENKINS, III, *Petitioner*,

v.

THE FLORIDA BAR, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM H. ADAMS, III
P. O. Box 4099
Jacksonville, Florida 32201
Attorney for Respondent

September 4, 1970

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IN THE

United States Supreme Court

October Term, 1970

No. 381

ELI S. JENKINS, III, *Petitioner*,

v.

THE FLORIDA BAR, *Respondent*.

BRIEF FOR THE FLORIDA BAR IN OPPOSITION TO PETITION FOR CERTIORARI

Question Presented

Although Petitioner has listed four questions as being raised by his Petition for Certiorari, Respondent submits that the Petition actually raises only one question:

> Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment are violated by Rule 11:07(3) of the Integration Rule of The Florida Bar (adopted by the Supreme Court of Florida) which provides that if an attorney is found guilty of a felony by a court of competent jurisdiction his right to practice law shall be suspended without an evidentiary hearing even though an appeal from his conviction is pending.

Statement of the Case

On March 11, 1970, following a seven-week jury trial in the United States District Court for the Middle District of Florida, Petitioner, an attorney and a member of The Florida Bar[1], was convicted of violating the White Slavery Traffic Act, Title 18, U.S.C. §2422. Violation of this act is a felony.

Rule 11:07 of the Integration Rule of The Florida Bar which was adopted by the Supreme Court of Florida under Article V, §23 of the Florida Constitution provides that the determination by a court of competent jurisdiction that a member of The Florida Bar is guilty of a felony "shall be conclusive proof of the guilt of the offense charged for the purposes of these rules." The rule goes on to provide that when a judgment of guilt is entered by a court other than a court of the State of Florida, the convicted attorney shall "stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of the judgment." Under the rule, the suspension continues until final disposition of the convicted attorney's appeal or until the convicted attorney shows good cause for terminating the suspension.[2]

On March 12, 1970, The Florida Bar, pursuant to Rule 11:07, filed a copy of the judgment of guilt with the Supreme Court of Florida, together with a petition requesting that Petitioner be suspended from the practice of law. In his response, Petitioner admitted all of the material allegations of

1. The Florida Bar is a corporate body created by and existing under the authority of the Supreme Court of Florida. All lawyers in Florida are required to be members. The Bar has been charged by the Supreme Court of Florida with the maintenance of professional standards in the practice of law. To that end it has been vested as an official arm of the Court with the powers and authority described in the Integration Rule of The Florida Bar. The Integration Rule is reproduced in 32 FLA. STAT. ANN. pp. 497, et seq., as amended, 225 So.2d 881 (1969).

2. The text of Rule 11:07 is attached as Appendix 1.

the petition, including his conviction. He alleged, however, that in convicting him, the United States District Court had committed various specified errors, that an appeal from his conviction was pending and that he and his counsel believed the conviction would be reversed by the Court of Appeal. The issue of whether Petitioner should be suspended was argued orally before the Florida Supreme Court, but no evidentiary hearing was held. On April 7, 1970, the Supreme Court entered an order suspending Petitioner as a member of The Florida Bar until further order.

Argument

Respondent respectfully submits that the Petition for Certiorari does not raise a Federal question of substance which was decided in a way not in accord with the applicable decisions of this Court.

A state may take reasonable steps to protect the public from those who may be unfit to practice law.

The decisions of this Court make it clear that although the right to pursue one's chosen profession is a precious liberty which may not be arbitrarily taken away, the state has a legitimate interest in protecting the public by supervising the fitness of those who practice law.

A state cannot exclude a person from the practice of law in a manner or for reasons that violate the Fourteenth Amendment; however, a state may require high standards of qualification, such as good moral character, if the requirements have a rational connection with an applicant's fitness to practice. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). A state may require continuing professional and moral fitness as a condition to an attorney's retention of the right to practice. *Cohen v. Hurley*, 366 U.S. 117 (1961).

The State of Florida has determined that conviction of a felony creates sufficient doubt as to an attorney's continued qualifications to warrant his suspension until the doubt is resolved.

Rule 11:07 represents a determination by the State of Florida that when an attorney has been convicted of a felony a grave doubt exists as to his fitness to practice law. It represents a further determination that protection of the public requires that the attorney be suspended until that doubt is finally resolved.

The rule does not permit imposition of conclusive disciplinary action until the attorney's guilt or innocence is finally determined. It simply requires that he be suspended until the case is finally decided. If the convicted attorney appeals and is finally acquitted, the rule contemplates that his suspension will be terminated. If the judgment of guilt is affirmed, the Supreme Court of Florida must then determine what discipline should be imposed. No disciplinary action may be taken unless the attorney's conviction is affirmed.

Conviction of a felony by a court of competent jurisdiction is a reasonable ground for suspension.

Conviction by a court of competent jurisdiction carries with it a presumption of correctness. This presumption provides a sufficient rational basis for a state to take action to protect the public pending the convicted attorney's appeal.

On August 12, 1970, the House of Delegates of the American Bar Association approved a report of the Association's Special Committee on Evaluation of Disciplinary Enforcement. The Report, entitled "Problems and Recommendations in Disciplinary Enforcement," outlines in the following language the dangers to the public if a convicted attorney is allowed to continue his practice pending appeal:

> The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect

upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain. *Id.* 125.

The Report recommends that all states adopt "[a] court rule providing for suspension pending appeal of an attorney convicted of a serious crime . . . until final disposition of a disciplinary proceeding based on the conviction, with provisions for immediate reinstatement should the conviction be reversed." *Id.* 122.

The Report observes that:

The public is unable to comprehend . . . why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice. *Id.* 123.

It concludes that:

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline. *Id.* 124.

The Report contains the following comment on the constitutional validity of the proposed rule:

> Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt.
>
> It is significant to note that the procedure adopted by the Supreme Court of the United States in supervising the members of its bar includes suspension pending the conclusion of a disciplinary proceeding and the imposition of final discipline. Revised Rule 8 of the rules of that court provides that:
>
> > Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within 40 days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the 40 days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of the majority of the justices participating. *Id.* 127-128.

A copy of the relevant portions of the Report is attached as Appendix 2.

The necessity of protecting the public by suspending a convicted attorney has been recognized by other states which operate under rules similar to the Florida Integration Rule. *In re Flowers*, 230 So.2d 519 (Ala. 1970); *In re Gantt*, 230 So.2d 525 (Ala. 1970), *cert. denied*, 38 U.S.L. WEEK 3518 (June 29, 1970); *In re Minner*, 133 Kan. 789, 3 P.2d 473 (1931); *In re Fields*, 28 App. Div. 2d 34, 280 N.Y.S.2d 975 (1967). The Alabama Supreme Court recently said:

> The welfare of the profession and the preservation of the public confidence in its honor and integrity, demand the removal of the convicted attorney from his position of trust and responsibility. *In re Flowers*, supra 522.

It is customary in other instances to suspend rights for the protection of the public pending appeal from a conviction.

There are many instances in which suspension of a right has been regarded as necessary to protect the public pending appeal of a conviction. Some of these are:

1. *Bail pending appeal.* This Court has recognized that if granting bail pending appeal would jeopardize the safety of the community it would be irresponsible judicial action to grant bail. *Carbo v. U.S.*, 82 Sup. Ct. 662, 7 L. Ed. 2d 769 (1962); and that a bond may be higher after conviction than before. *Sellers v. U.S.*, 89 Sup. Ct. 36, 21 L. Ed. 2d 64 (1968).

2. *Public officeholders.* Under various statutes public offices are declared vacant upon conviction of the incumbent. Generally unless the statute specifically provides otherwise, the vacancy occurs when the judgment of conviction is rendered by the trial court. *McKannay v. Horton*, 151 Cal. 711, 91 P. 598 (1907); *State ex rel. Hunter v. Jurgensen*, 135 Neb. 136, 280 N.W. 886 (1938) *cert. denied* 307 U.S. 643; *People ex rel. Keenan v. McGuane*, 13 Ill.2d 520, 153 N.E.2d 168 (1958).

3. *Disqualification of electors.* For the purposes of determining the qualification of electors, conviction of a felony is

deemed to create a presumption of guilt which is not destroyed by a pending appeal. *State ex rel. Olson v. Langer*, 65 N.D. 68, 256 N.W. 377 (1934).

4. *Suspension of driver's licenses.* For the protection of the public, driver's licenses may be suspended upon conviction of certain offenses. These statutes are generally held to require suspension of driver's license upon the entry of the judgment of guilt even though an appeal is pending. *Parker v. State Highway Department*, 224 S.C. 263, 78 S.E.2d 382 (1953).

There was no need for an evidentiary hearing.

Petitioner contends that the Fourteenth Amendment required the Florida Supreme Court to give him an evidentiary hearing at which he could present witnesses and evidence. The only purpose of such a hearing would be to reconsider Petitioner's guilt, or perhaps to review the alleged errors made by the United States District Court in convicting him. If Rule 11:07 is valid, the Supreme Court of Florida had no duty to inquire either into Petitioner's guilt or into any mitigating circumstances. As this Court stated in *Berman v. U.S.*, 302 U.S. 211 (1937):

> Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence . . . His civil rights may be determined solely by reference to the judgment. *Id.* 213.

The only factual issue was whether Petitioner was in fact convicted. Petitioner admitted his conviction in the paper he filed with the Supreme Court of Florida. Hence, there was no need for an evidentiary hearing.

The suspension was properly of indefinite duration.

Petitioner complains because he was suspended until further order of the Florida Supreme Court. Rule 11:07 contemplates that the suspension of a convicted attorney will be terminated if the conviction is reversed on appeal. Since the conviction was in a Federal court, the Florida Supreme Court cannot take judicial notice of any reversal. It must be brought to the Court's attention by a motion. If the conviction is reversed, Petitioner may apply to the Florida Supreme Court for a termination of his suspension. If the Florida court should refuse to terminate the suspension, the issue of whether its action was proper may be brought to this Court. Until that time, Petitioner's contention is premature.

Conclusion

For the reasons stated it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

William H. Adams, III
P. O. Box 4099
Jacksonville, Florida 32201
Attorney for Respondent

APPENDIX 1

Integration Rule of the Florida Bar
225 So.2d 881 (1969)

RULE 11:07. DISCIPLINE UPON CONVICTION

(1) *Determination or judgment of guilt.* Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial or plea of any crime or offense that is a felony under the laws of this State, or under the laws under which any other court making such determination, or entering such judgment exercises its jurisdiction, shall be conclusive proof of the guilt of the offense charged for the purposes of these rules. Upon such determination or entry of such judgment of guilt by any court of this state, the judge or the clerk thereof shall transmit a certified copy of such determination or judgment to the Clerk of this Court and to the Executive Director of The Florida Bar.

(2) *Suspension by judgment (Florida).* If such judgment of guilt is entered by a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the entry of the judgment unless he shall before that day file a petition with the Supreme Court to modify or terminate such suspension as elsewhere provided. If such petition is filed on or before the 10th day following the entry of the judgment, the suspension will be thereby deferred until entry of an order upon the petition.

(3) *Petition to modify or terminate suspension.* At any time after the entry of a judgment of guilt, the convicted attorney may file a petition with the Supreme Court to modify or terminate such suspension and shall serve a copy thereof upon the Executive Director. An opportunity to respond to the petition and appear at any hearing on the petition shall be afforded to The Florida Bar. If such petition is filed after the tenth day following the entry of judgment of guilt, the suspension shall

remain in effect pending disposition of the petition. Modification or termination of suspension shall be granted only upon a showing of good cause.

(b) *Continuation of suspension until final disposition.* If an appeal is taken by the convicted attorney from the judgment of this trial court in the criminal proceedings, and on review the cause is remanded for further proceedings, the suspension shall remain in effect until the final disposition of the criminal cause unless modified or terminated by the Supreme Court as elsewhere provided.

(c) *Termination of suspension.* Such suspension shall continue until final disposition of the criminal cause unless sooner terminated by order of the Supreme Court as elsewhere provided. A final disposition of the criminal cause resulting in acquittal will terminate the suspension. A final termination of the criminal cause resulting in a determination or judgment of guilt shall continue the suspension until expiration of all periods for appeal and rehearing, and until after termination of disciplinary proceedings by The Florida Bar as elsewhere provided.

(3) *Suspension by judgment* (other than by state court). If any such determination or judgment of guilt is entered by any court other than a court of the State of Florida, the convicted attorney shall stand suspended as a member of The Florida Bar on the 11th day following the filing with the Clerk of the Supreme Court of a certified copy of such determination or judgment, accompanied by proof of service of notice of such filing upon the convicted attorney; provided, however, that if the convicted attorney shall prior to the 11th day file a petition with the Supreme Court to modify or terminate the suspension, then the suspension will be deferred until entry of an order upon the petition.

(4) *Disciplinary judgment after conviction.* If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or

by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged. The Florida Bar may thereafter petition the Supreme Court for issuance of a notice to the convicted attorney to show cause why appropriate disciplinary judgment should not be entered. The respondent attorney may, within fifteen (15) days, file his return with the Clerk of the Supreme Court. The Court shall direct such further proceedings as may be appropriate.

APPENDIX 2

American Bar Association,
Problems and Recommendations in Disciplinary Enforcement
122-130 (1970)

PROBLEM 22

No provision for suspension pending appeal of attorneys convicted of serious crimes (as defined on page 128) before the disciplinary proceeding based on the conviction is concluded.

DIMENSION

Failure to take prompt action against an attorney convicted of a crime permits him to continue to practice despite the conviction and undermines the public's confidence in the profession. Some jurisdictions, particularly those in the western United States whose procedure is patterned on that of California, provide for immediate suspension of attorneys convicted of "crimes involving moral turpitude." That term, however, is difficult to define, historically means different things in different jurisdictions and itself causes substantial litigation to determine whether a particular crime is one "involving moral turpitude." Its use as a criterion in disciplinary enforcement may cause additional embarassment to the profession. For example, it has been held that a conviction for the willful filing of false and fradulent income tax returns does not necessarily involve moral turpitude for purposes of the California statute authorizing the imposition of discipline. *Re Hallinan*, 43 Cal. 2d 243 (1954). It is, therefore, possible under such a provision for an attorney who has been convicted of a crime for which he may be subjected to a substantial period of imprisonment and fine to remain in good standing at the bar and not subject to any professional discipline for his crime.

RECOMMENDATION

A court rule providing for suspension pending appeal of an attorney convicted of a serious crime (as defined on page 128) until final disposition of a disciplinary proceeding based on the conviction, with provisions for immediate reinstatement should the conviction be reversed.

DISCUSSION

Many jurisdictions do not initiate any disciplinary action against an attorney convicted of a crime until all appeals have been exhausted. Others take immediate action if the crime involved is a felony but not otherwise. Under these procedures the attorney continues to practice, often for a number of years after the conviction. It does not even matter whether the crime involves conduct as an attorney; so long as an appeal is pending, the disciplinary process is stymied. One state bar counsel testified:

> Under our state bar rules, if any person is convicted of a felony, disbarment is compulsory. This is not automatic. It means you've got to file a pleading before the appropriate court and call the court's attention to it. Once the facts are established and there is a conviction, disbarment is compulsory. The court has no discretion.
>
> We have a continued discussion as to what constitutes conviction. Many committees say it must be a final conviction, and some of them go to extreme lengths. For instance, we had a situation where there was a man serving time in the penitentiary. At all times he had a writ of habeas corpus pending in some federal court. That committee took the attitude that that conviction was not final.

A similar situation was described by the president of a state bar:

> We have a member of our bar who has been tried three times in the United States district court. I think one was a

mistrial, a new trial and a conviction in the third trial of false swearing in a bankruptcy and concealing assets. His conviction was confirmed by the court of appeals. The mandate was stayed so that he could file a petition for certiorari in the Supreme Court of the United States, and he is at large. As far as I know he is continuing to swear and, I presume, falsely. I don't know.

We are deeply concerned with the fact that he is at large and that he is privileged to injure people that place their confidence and trust in him.

The public is unable to comprehend why an attorney convicted of stealing funds from a client can continue to handle client funds; or why an attorney convicted of securities fraud can continue to prepare and certify registration statements; or why an attorney convicted of filing a fraudulent income tax return can continue to prepare and file income tax returns for clients; or why an attorney convicted of conspiracy to suborn perjury can continue to try cases and present witnesses; or why an attorney convicted of bribing officials of an administrative agency can continue to practice before the very agency he has corrupted; or, indeed, why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice. The chairman of a state bar association disciplinary agency explained:

A very prominent member of the bar was convicted, I think in early 1964, for embezzlement. He appealed ultimately to our court of last resort and certiorari was granted. Now, that man is practicing law. And, in fact, arguing cases before the court of appeals for five years now.

Now, the public cannot understand that. The public simply cannot understand how a man who has been convicted of embezzling large sums of public monies can be practicing law and arguing cases, and in truth, arguing cases before the court of appeals, while his appeal there on these convictions is still pending.

The Deputy Commissioner of Internal Revenue provided another illustration:

> First, take the case of the attorney who decided that he could be of greater assistance to his clients if he could assure them that their returns would not be audited, or if audited, that they would be closed without any tax change. So, for an extra fee, he bribed our agent, who in turn closed the cases requiring no change.
>
> When we in the Internal Revenue Service became suspicious of the employee, we had inspectors quietly begin an investigation designed to establish the truth or falsity of the suspicions. Having obtained evidence of our own employee's involvement in the scheme, we confronted him with our evidence, obtained his removal from the service, and persuaded him to become a witness against the attorney. Almost at once, our own house was back in order, having dismissed the dishonest employee, but what of the dishonest attorney?
>
> Our evidence was presented to the grand jury and he was indicted. Subsequently, after a period of time, his case came to trial, and he was convicted. He then filed an appeal to the court of appeals. This court affirmed the conviction. He filed an appeal for certiorari with the Supreme Court. The Supreme Court denied certiorari and he asked for a rehearing. The rehearing was denied, and eventually the trial court was directed to carry out the judgment of conviction.
>
> Appeals, as you know, take time. This one took approximately three years from the date the judgment of conviction was entered until the appeals were exhausted. In the meantime, this attorney, convicted of bribery, was free to continue his practice before the Internal Revenue Service, I think to the detriment of the entire profession and to the consternation of the Service, who knew him for what he was—a convicted felon, capable of suborning a heretofore honest and trusted employee.

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar

than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline. The chairman of a state bar disciplinary agency testified:

> We do not have automatic disbarment as you asked just now. Many times people are lenient towards those who are convicted. That is especially true in the area of income tax convictions. We have one attorney who served 18 months in one of our fine federal prisons; and nothing was ever done about his case. He is walking around practicing law and I have been unable to explain to the people in my district why that man is still practicing. Nothing was done about it. Some members of the governing body took the position that that was a civil matter and it was up to the federal government to collect the taxes and that the grievance committee was not going to go out and undertake to disbar people. That had been established as the policy, and I don't know what to do about it, but it is the most difficult situation to explain to the lay public.

The effect that prompt action against attorneys convicted of serious crimes has on the profession's reputation was illustrated in the testimony of a former member of a state bar board [of] governors:

> We do have an automatic suspension on conviction of a crime. Our rule of court provides if it appears to the state supreme court that a member of the state bar has been convicted of a misdemeanor involving moral turpitude or a felony the supreme court must suspend such member summarily. This doesn't mean only convictions in this state; this means a conviction anywhere. Since the adoption of that policy, we are happy to relate that there has been a dearth, an absolute dearth, of public or news media complaints about lawyers practicing following a conviction.
>
> What drove us to get this rule was our news media, who, being quite interested in the activities of the legal profession, made numerous complaints about letting lawyers continue to practice after being convicted of a crime.

The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain.

A policy which thus jeopardizes the rights of innocent clients cannot be justified. Quite incongruously, the profession generally recognizes these considerations in the procedures by which it processes conventional disciplinary proceedings. Discipline imposed in those proceedings is not deferred automatically because the attorney seeks to appeal the adverse finding. We are unable to find any rationale for a procedure that affords greater protection to the attorney convicted under the reasonable doubt standard of the criminal procedure than it does to the attorney found guilty in a conventional disciplinary proceeding by a preponderence of the credible evidence, the standard of proof required in most jurisdictions.

We recommend that attorneys convicted of serious crimes be suspended immediately until a disciplinary proceeding

based on the conviction is concluded and final discipline imposed. Our use of the term "serious crime" is a recognition that not every act denominated a crime so clearly reflects upon an attorney's fitness that suspension prior to imposition of discipline is warranted. The jurisdictions that now provide for immediate suspension of convicted attorneys distinguish crimes on the basis of whether they involve "moral turpitude." Experience indicates, however, that that term is too imprecise and has resulted in inconsistent decisions by courts as to whether particular crimes do or do not involve moral turpitude. We prefer to use "serious crime" and to define it in our proposed rule.

A necessary corollary to the prompt suspension of attorneys convicted of serious crimes is the implementation of a procedure whereby an attorney so suspended can be reinstated promptly should the conviction be reversed on appeal. Once the basis for suspension no longer exists, the suspension itself must be removed, lest injustice be perpetrated.

We envision the following procedure, which is predicated on present practice in California, except for the substitution of the term "serious crime" (together with its definition) in place of the term "crime involving moral turpitude."

Upon receipt of a certificate showing that an attorney has been convicted of a crime, the court having disciplinary jurisdiction shall determine whether the crime constitutes a "serious crime" as defined in the proposed rule. If the conviction is for a "serious crime," the court having disciplinary jurisdiction will enter immediately an order suspending the attorney pending the conclusion of a disciplinary proceeding to be instituted on the basis of the conviction and the imposition of final discipline.

At the same time the court having disciplinary jurisdiction either will enter an order instituting a disciplinary proceeding and appointing the local disciplinary agency to prosecute it (in nonintegrated bar states) or will refer the matter to the state

bar for the institution of a disciplinary proceeding (in integrated bar states). The disciplinary proceeding will not be brought to a hearing, at which the sole issue will be the measure of discipline to be imposed, until all appeals are concluded and the conviction is final.

Should the conviction be reversed on appeal while the attorney is suspended, the attorney need only file a certificate showing the reversal with the court having disciplinary jurisdiction, and it will forthwith enter an order reinstating him. That order will not affect the pending disciplinary proceeding, which continues until concluded.

If the conviction does not involve a serious crime, the court having disciplinary jurisdiction will not suspend the attorney immediately but will refer the certificate of conviction to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it deems warranted. In addition, the court may, by appropriate rule, exclude minor offenses such as traffic infractions from this process.

Responsibility for forwarding the certificate of an attorney's conviction to the court having disciplinary jurisdiction will be placed on the clerks of courts of original criminal jurisdiction within the state and on the disciplinary agency.

Implementation of this proposed procedure will have the additional benefit of dramatically reducing delay before final disposition of disciplinary proceedings grounded on criminal convictions. Under present practice, the attorney prolongs the appeal for as long as he can since disciplinary action is deferred while the appeal is pending. Once the attorney is suspended immediately from practice until the subsequent disciplinary proceeding is concluded, and that proceeding is deferred while appeals are pending, it will be in the attorney's interest to expedite the appellate process.

Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings

expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt.

It is significant to note that the procedure adopted by the Supreme Court of the United States in supervising the members of its bar includes suspension pending the conclusion of a disciplinary proceeding and the imposition of final discipline. Revised Rule 8 of the rules of that court provides that:

> Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within 40 days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the 40 days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of the majority of the justices participating.

PROPOSED RULE

A rule providing for immediate suspension of attorneys convicted of serious crimes should include the following provisions:

1. An attorney will be suspended automatically upon his conviction of a serious crime, whether the conviction resulted

from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

2. The term "serious crime" means a felony or any specified lesser crime a necessary element of which, as determined by the statute defining such crime, reflects upon the attorney's fitness. The lesser crimes to be specified in the rule should include, for example, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, corruption, coercion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a "serious crime." (In recommending that the determination of whether the lesser crime reflects on the attorney's fitness be made from reference to the statute defining the crime, we are suggesting a significant variation from the California procedure. In that state the determination of whether a crime is one involving moral turpitude is made in some instances by reference to the evidence in the criminal prosecution rather than solely on the basis of the provisions of the criminal statute. This can lead to the ironic situation in which one attorney may be disbarred and another not subject to any discipline, although both have been convicted of violation of the same criminal statute.)

3. An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his automatic suspension, but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney.

4. A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction.

5. Upon the receipt of a certificate of conviction of an attorney of a serious crime, the court having disciplinary juris-

diction will not only suspend him from practice but also will immediately institute a disciplinary proceeding in which the sole issue to be determined will be the extent of the final discipline to be imposed, and the court will refer the matter to the appropriate disciplinary agency for that purpose, provided, that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

6. Upon the receipt of a certificate of conviction of an attorney for a crime not constituting a serious crime, the court having disciplinary jurisdiction will refer the matter to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it may deem appropriate, provided, however, that the court in its discretion will make no reference with respect to convictions for minor offenses.

7. The clerk of any court within the state in which an attorney is convicted will transmit a certificate of conviction to the court having disciplinary jurisdiction and to the appropriate disciplinary agency within a specified period after the conviction.

8. Any disciplinary agency, upon receiving information that an attorney admitted to practice in the state has been convicted of a crime in a court within that state, will determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to the court having disciplinary jurisdiction. If the certificate has not been forwarded by the clerk or if the conviction occurred in another state, the disciplinary agency will obtain a certificate of the conviction and forward it.